

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

----- X  
JOSEPH ORTIZ, on behalf of himself and :  
all others similarly situated, :

Plaintiff, :

v. :

ROCKY BRANDS, INC., :

Defendant. :

No. 1:22-cv-00699

**DEFENDANT’S MOTION  
TO DISMISS PLAINTIFF’S  
COMPLAINT**

----- -X  
**ROCKY BRANDS, INC.’S MOTION TO DISMISS**

Defendant Rocky Brands, Inc., in accordance with Rule 12(b)(1) of the Federal Rules of Civil Procedure and through its undersigned counsel, hereby moves the Court for an order dismissing the Complaint filed by Joseph Ortiz for the following reasons:

1. Joseph Ortiz has asserted against Rocky Brands claims for violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the “ADA”) and the New York State Human Rights Law, N.Y. Exec. Law § 296 *et seq.* (the “NYSHRL”). Plaintiff alleges that a website owned and operated by Rocky Brands is not accessible to blind and visually impaired consumers in violation of the ADA and NYSHRL.

2. Rocky Brands moves to dismiss this lawsuit because Rocky Brands has made its website [www.muckbootcompany.com](http://www.muckbootcompany.com) accessible and usable by screen reader users and has remedied all alleged violations Plaintiff alleges in his Complaint. As shown through video evidence of a visually impaired individual using the Website, Plaintiff should be able to learn all about Rocky Brands products, should be able to order products, and should be able to learn about everything else that is posted on the Website.

3. Rocky Brands' Website is currently usable, and is continually monitored to be able to be used by screen reader users. Therefore the claims raised in Plaintiff's Complaint are moot, and the Complaint must be dismissed pursuant to the Fed. R. Civ. Pro. 12(b)(1) for lack of subject matter jurisdiction.

4. Furthermore, Plaintiff does not have standing to bring this claim as he has not pled that he tried to contact Defendant's customer service line or email address. If he called Defendant's customer service line during business hours or emailed the dedicated customer service email address which was available through the website's accessibility page, he could have been helped by a live individual to learn about Defendant's products and purchase product. *See* 8 C.F.R. Pt. 36, App'x C ("the auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication").

5. Plaintiff also cannot establish standing because he has failed to show an "injury in fact" since he did not plead any specific product that he was interested in purchasing on Defendant's website. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Moreover, Plaintiff fails to establish standing in an ADA action because he has failed to allege an intent to return to the Website in the near future. *See Guglielmo v. Neb. Furniture Mart, Inc.*, No. 19-cv-11197, 2020 WL 7480619 (S.D.N.Y. Dec. 18, 2020).

6. Prior to filing this motion, Defendant's counsel told Plaintiff's counsel a motion to dismiss would be filed and outlined these arguments. Defendant's counsel refused to dismiss the Complaint, necessitating this filing.

7. Defendant intends to file a reply brief in further support of this motion.

WHEREFORE, Rocky Brands, Inc., respectfully requests that this Court enter an Order granting this motion to dismiss and dismissing the Complaint with prejudice. In support of this motion, Rocky Brands relies upon the attached memorandum of law and accompanying exhibits.

Dated: December 12, 2022

Respectfully submitted,

/s/ Leslie Paul Machado

Leslie Paul Machado

O'HAGAN MEYER, PLLC

2560 Huntington Avenue, Suite 204

Alexandria, Virginia 22303

Telephone: (703) 775-8607

Facsimile: (804) 403-7110

[lmachado@ohaganmeyer.com](mailto:lmachado@ohaganmeyer.com)

***Counsel for Defendant Rocky Brands, Inc.***

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 12th day of December 2022, I filed the foregoing with the Court using the CM/ECF system, which will serve all counsel of record.

/s/ Leslie Paul Machado

Leslie Paul Machado